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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 569

VINCENZO IANNELLA AND FRANK S. RUSSO,
Appellants,

vs.

ARVID JOHNSON, RECORDER OF THE TOWNSHIP OF PISCATAWAY, NEW JERSEY, AND THE TOWNSHIP OF PISCATAWAY, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

MAURICE M. BERNSTEIN,
Counsel for Appellees.

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ARVID JOHNSON, RECORDER OF THE TOWNSHIP OF PISCATAWAY, AND THE TOWNSHIP OF PISCATAWAY, A MUNICIPAL CORPORATION OF NEW JERSEY

ON APPEAL FROM SUPREME COURT OF NEW JERSEY, FORMERLY THE COURT OF ERRORS AND APPEALS OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

As provided for in Rule 12, paragraph 3, appellees submit this statement disclosing matters making against the jurisdiction of this Court and motion that the appeal be dismissed or in the alternative that the judgment of the Supreme Court of New Jersey formerly New Jersey Court of Errors and Appeals, be affirmed.

Opinions Below

The opinion of the former Supreme Court of New Jersey on the disposition of appellants' appeal under Revised

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Statutes of New Jersey 2:215-7 is not published in the official State reports but it is set forth, herein, in full, under the caption "Nature of the Case and Proceedings Below." It is also included in the record being transmitted to this Court, State of Case pages 68-70.

The opinion of the former Supreme Court of New Jersey in the Certiorari proceedings reviewing the decision above mentioned, is reported in 136 N. J. L. 514 (56 At. 2d 894).

The opinion of the former New Jersey Court of Errors and Appeals (now Supreme Court of New Jersey) is reported in 137 N. J. L. 659 (61 At. 2d 237).

Nature of the Case and Proceedings Below

Because the unreported opinion written by Justice Colie, one of the justices of the former Supreme Court of New Jersey, is so concise and sets forth the pertinent facts of the case with such an economy of words, we copy the same in toto herewith:

> "In 1937 the Township, by Section 9 of its ordinance, prohibited the use of any building in the township for the slaughter of animals. In 1943 the Board of Adjustment granted to the then owner of the slaughter house in question, one Geschwind, a temporary exception until the cessation of hostilities and three months thereafter. In March 1946 Geschwind sold the business to Iannella and Russo, who applied to the Board of Adjustment for the extension of the exception, which application was denied in August 1946. Iannella and Russo, the aggrieved persons, took no appeal from the denial of their application within the thirty day period prescribed by the statute. Thereafter, the township instituted proceedings in the Recorder's Court against Iannella and Russo for a violation of the zoning ordinance and they were convicted. Application was then made to me for a writ of certiorari which was denied, the reason for the denial being that Iannella and Russo did not seek to review the action of the Board of Ad-

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justment by certiorari within the thirty days allowed by statute. In this posture of affairs, Iannella and Russo applied to the Court of Chancery and were granted a temporary injunction restraining the municipality from interfering with the operation of the slaughter house. In November 1946 and after the proceedings had been instituted in the Court of Chancery, Iannella and Russo applied to me to review the legality of the conviction in the Recorder's Court proceeding under R. S. 2:215-7. In December 1946 the proceeding under R. S. 2:215-7 was adjourned *sine die* pending the handing down of a decision in the Court of Chancery. On April 8, 1947 the Court of Chancery continued the restraint in order to enable Iannella and Russo to apply to the Supreme Court for relief. In accordance with the suggestion contained in the opinion of Vice-Chancellor Jayne, Messrs. Iannella and Russo applied to me on April 15th for a writ of certiorari or, in the alternative, a rule to show cause why certiorari should not be allowed to review the legality, validity and constitutionality of the zoning ordinance of Piscataway Township, particularly Section 9 prohibiting the business of slaughtering animals in the township. As to the application to me to review the conviction under R. S. 2:215-7, that matter has been adjourned *sine die* and we are not now concerned with it. However, in order to dispose of that phase, the court, on its own motion, denies the application seeking a review before me as a single justice on the ground that Messrs. Iannella and Russo had a legal remedy which they might have pursued but did not do so and having abandoned that, they may not now come in and seek a review which turns upon the validity of the ordinance before me as a single justice.

As to the application before me for a writ of certiorari or a rule to show cause, that application is denied on the ground that Iannella and Russo are palpably in laches."

Appellants obtained a Writ of Certiorari from the former New Jersey Supreme Court reviewing the above decision.

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The decision was affirmed. Appeal was taken to the former New Jersey Court of Errors and Appeals (now Supreme Court of New Jersey) which court likewise affirmed the decision of the inferior court.

Throughout the proceedings in the State courts appellants urged that the zoning ordinance was unconstitutional and that therefore the conviction in the Recorder's Court was improper. Appellees met this contention with the argument, among others, that appellants were barred from questioning the constitutionality of the zoning ordinance because they were attempting to do so by *collateral* attack rather than by direct attack, contrary to the established law of the State of New Jersey.

The State Courts decided that the appellants were not entitled to attack the constitutionality of the zoning ordinance by collateral attack; (see *Home Fuel Oil Co.* v. *Borough of Glen Rock*, et al, 118 N. J. L. 340; 192 At. 516) that the appellants had waived their right of review of the adverse action of the Board of Adjustment and that therefore it was unnecessary for the State courts to consider the question of the constitutionality of the ordinance.

The Federal Question Was Not Presented in Conformity With State Procedure

The authority of the municipality to adopt a zoning ordinance is derived from Chapter 274, P. L. of N. J. 1928 (R. S. N. J. 40:55-30 et seq.) as well as the former Constitution of New Jersey. (See N. J. S. A. Const. art. 4, Sec. 6, para. 5.)

The statute not only provides for the establishment of a Board of Adjustment by ordinance but it also provides for the powers of the said Board as well as the method of appeal from the Board's decisions.

R. S. N. J. 40:55-46 reads,

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"No writ of certiorari to review any decision of the Board of Adjustment shall issue unless application therefor be made within 30 days after the filing of the decision in the office of the board. * * *"

Appellants contend that they were not obliged to seek a Writ of Certiorari to review the refusal of the Board of Adjustment to grant a variance to the zoning ordinance, on the ground that the Board of Adjustment had no legal authority to grant such a variance.

Assuming the Board of Adjustment did not have the power to grant appellants' request, under the Statute, R. S. N. J. 40: 55-39 and the ordinance, the Board did have the authority to either *recommend* favorable action to the municipal governing body or to *refuse to recommend* favorable action to the governing body on appellants' application for a variance from the terms of the zoning ordinance.

The following New Jersey decisions support the proposition that where the Board of Adjustment refuses to make a favorable recommendation to the municipal governing body or makes an unfavorable recommendation, such action by the Board is a final determination and is subject to review by Certiorari.

Brandon v. *Comm'rs of Town of Montclair*, 124 N. J. L. 135, 11 At. 2d 304, Aff'd 125 N. J. L. 367, 15 At. 2d 598; *Schaible, et al.* v. *Board of Adjustment, et al.*, 134 N. J. L. 473, 49 At. 2d 50; *Bleloch* v. *Board of Adjustment of Margate City*, 134 N. J. L. 564, 49 At. 2d 501; *Sandler, et al.* v. *Board of Commissioners of City of Trenton, et al.*, 126 N. J. L. 392, 19 At. 2d 788; *Verniero* v. *Board of Commissioners of City of Passaic, et al.*, 134 N. J. L. 71, 45 At. 2d 890; *Peterson* v. *Mayor & Council of Borough of Palisades Park*, 127 N. J. L. 190, 21 At. 2d 777.

The failure of the appellants to follow the statutory procedure in taking their appeal from the adverse decision of the Board of Adjustment, was the basis for the adverse

decisions in the State courts from which appellants attempt to appeal to this court.

Had the appellants appealed the adverse decision of the Board of Adjustment within the 30 day statutory period, they would have then been able to question the constitutionality of the zoning ordinance by direct attack and the state courts would then have been compelled to rule on the constitutional question.

It has been held in the following cases that the construction of a state statute or the provision of a state constitution by the highest court of the state will be followed:

Central U. Teleph. Co. v. *Edwardsville,* 269 U. S. 190, 195; *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113; *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 520; *Truax* v. *Corrigan,* 257 U. S. 312, 324; *Coombes* v. *Getz,* 285 U. S. 434.

It has likewise been held that a federal question must be presented in conformity with state procedure. *Herndon* v. *Georgia,* 295 U. S. 441; *United Gas Pub. Serv. Co.* v. *Texas,* 303 U. S. 123.

Norris v. *Alabama,* 294 U. S. 587 holds that it must appear that the federal question was present, distinctly ruled upon, and denied, at least in circumstances before the Supreme Court of the United States would take jurisdiction. In the case *sub judice,* all of the inferior courts found it unnecessary to decide the federal question raised by the appellants because there was adequate and independent state ground on which to rest their decisions.

The Decision of the State Court Rests on an Adequate Non-Federal Ground and Therefore This Court Should Not Take Jurisdiction of the Case.

Herb v. *Pitcairn,* 324 U. S. 125 holds that,

> "This Court from the time of its foundation has adhered to the principle that it will not review judg-

ments of state courts that rest on adequate and independent state grounds."

Since appellants had an adequate remedy in the state courts, through which the constitutionality of the ordinance could be questioned by direct attack and the state courts decided that appellants had not availed themselves of this remedy seasonably, the appellants should not now be permitted to be heard in this court, on the question of constitutionality of the ordinance. This court should not take jurisdiction of the case.

Conclusion

The appellants have failed to show affirmatively that the federal question was raised, that the decision was not or could not have been made under rules of general jurisprudence broad enough in themselves to sustain the judgment without considering the federal question, nor do appellants show that the federal question was distinctly ruled upon and denied by the state court. The appeal should be dismissed for want of jurisdiction or in the alternative the judgment of the Supreme Court of New Jersey (formerly New Jersey Court of Errors and Appeals) should be affirmed.

Respectfully submitted,

MAURICE M. BERNSTEIN,
Counsel for Appellees.

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